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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-1304

MONSANTO COMPANY,

Plaintiff-Appellee,

v.

KEM L. RALPH,

(individually and doing business as Ralph Brothers Farms),

Defendant-Appellant.

Judgment

[ENTERED FEBRUARY 14, 2005]

ON APPEAL from the UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

In CASE NO(S). 4:00-CV-135

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED FEB 14 2005

/s/ Jan Horbaly
Jan Horbaly, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:00-CV-135
	)	
KEM RALPH, INDIVIDUALLY, and d/b/a RALPH BROTHERS FARMS, A Partnership,	)	
	)	
	)	
	)	
Defendants.	)	

COPY

MOTION HEARING

BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

MARCH 4, 2004

[ENTERED MARCH 4, 2004]

APPEARANCES:

For Plaintiff: Joseph C. Orlet, Esq.
Erik L. Hansell, Esq.
HUSCH AND EPPENBERGER, LLC

For Defendants: James L. Robertson, Esq.
WISE AND CARTER

Louis J. Leonatti, Esq.
LEONATTI AND BAKER, PC

REPORTED BY: SHANNON L. White, RMR, CCR, CSR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7966

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

THE COURT: Okay. Obviously, it's abundantly clear, I suspect, but for those who later read this transcript, this issue was discussed at some length in the Samples, or Blades case, depending on what moniker you give it. I think even the Eighth Circuit calls it the McIntosh case.

The appellee's briefs have been filed in that case. Unfortunately, I don't have the benefit of reading them because they're under seal in the Eighth Circuit. I think that seal, though, is not permanent. I think there's a period of redaction time and so on.

But I suspect that this issue is percolating in that case; although, I don't know that. I haven't heard from either counsel. And since I haven't seen the briefs, I don't know if that's part of the appeal. I would be shocked if it wasn't. I mean, I'm interested in knowing what the Eighth Circuit thinks about it. We can all learn, obviously.

But for those at the federal circuit who may read this at a later time, I do believe this issue is under submission or will be shortly at the Eighth Circuit, and obviously, as I understand it, the transcript of my ruling in Blades is part of some filings now with the federal circuit. Is that right?

MR. ROBERTSON: It was part of the file here, and what we filed here we also submitted to the federal circuit.

THE COURT: I assume what you were doing was seeking remand under Rule 60 for me to do something.

MR. ROBERTSON: I was respecting the fact that in my life, up until about three weeks ago, I always thought if a case was on appeal, you had to ask permission of the Court of Appeals to proceed in any way in the district court. And that was a request for permission to do so and, specifically, to permit Your Honor to rule.

THE COURT: Okay. Well, we will save -- I think we have saved the federal circuit law clerks some time by having explained what the jurisdiction is here, because they obviously have to look at a lot of circuits for the procedural rules, and not every circuit is consistent on how a Rule 60 motion should be heard.

If we are going to share new knowledge, I think the most interesting thing is when a Rule 60 motion is filed in district court after the Court of Appeals has ruled, and then you have some strange opportunity for the district court to affect the outcome of an already-ruled Court of Appeals decision, but we won't get in that circle here. We don't need that.

The reason I wanted to have this hearing today is that I do think it's in all of our best interest to clarify these issues as soon as possible, as thoughtfully as possible, and have the federal circuit have the benefit of what we've done and/or haven't done. We've obviously spent now in excess of four years together. I don't know that we benefit or anybody benefits from protracted litigation, whether it's the client who has to pay the bills or the lawyers who are spending their time on the case.

One of the values, of course, of our system is that we do seek finality, so we can conduct ourselves accordingly, and that's what I'm attempting to do today.

The overarching concern, too, is that, as everybody here knows, the public has to have confidence that when they come to this building, they will get a fair and impartial hearing. In that regard, Congress has adopted a statute -- and justice is all of our business. We know that.

But Congress has adopted a statute governing when a judge should and should not recuse himself. There are countervailing considerations. A judge is not to recuse him-or

herself unnecessarily because then that undermines the confidence in the judicial system that the selection of the judge is no longer random but becomes manipulated or arbitrary, and that's not good.

There is more than one consideration at work here. A party -- and so we look at the Eighth Circuit law. And a party that introduces a motion to recuse, as we know, carries a heavy burden of proof. A judge is presumed to be impartial, and the party seeking disqualification bears the substantial burden of proving otherwise. I'm citing Pope v. Federal Express, 974 F.2d 982, citing Ouachita National Bank v. Tosco Corporation, 686 F.2d 1291.

Well, what do we know? We have -- and everybody has probably had the benefit of reading my ruling in the Blades case. There is an entry of appearance not signed by me in a Pioneer case involving Monsanto. Involves a Bt corn licensing agreement as I understand it.

I hate to relive these memories, but in the time that my name was put on that case, I was involved in the anti-trust case against the National Football League. That case went to trial the first week of October of 1997. So I have told the lawyers in Blades, and I will tell you, that I was not working on anything else but the St. Louis Convention and Visitors Commission case against the National Football League arising out of the transfer of the Rams to St. Louis and the attendant monies that were paid, or extracted as the case may be, by the National Football League from St. Louis and the Rams.

That case went to trial the first week of October, and before I finished that case, or before it was over, I had been confirmed by the United States Senate as a U.S. district judge. I had my confirmation hearing at the Senate Judiciary Committee while that case was going on, and the vote on my confirmation all were done while I was in trial. And that trial

lasted for --it was supposed to last two months. It lasted in excess of a month. And in the period leading up to that, that's all I was working on.

So as Mr. Leonatti ably stated, it is not uncommon to have your name put on a file even though you don't work on it or don't know anything about it. And as the affidavit by Mr. Conran in the file says, he anticipated that if, when that case was over, that that might be something I would work on, but it never came to pass because I wrapped up my legal practice and went on the bench.

So if there's any confusion about how it could be, how my name was on a file, the explanation is actually quite simple and direct. That's just -- that's what we know. We'll reach some inferences and conclusions from that. So I never worked on the Pioneer case.

What we do know and which I wasn't sure of in the Blades case until I saw the affidavits from Husch & Eppenberger is whether I had ever billed any time to Monsanto in the years leading up to my time leaving private practice. I didn't think I had. I had no recollection.

It's clear now from the affidavits that from 1995 to 1998, in the three years I was at Husch before I went on the bench, I didn't do any work for Monsanto. I didn't go to any meetings. I know what I didn't -- I didn't go to any meetings. I didn't talk to any partners about Monsanto cases. I didn't participate in the preparation of any Monsanto cases or in the discovery of any Monsanto cases.

And I will assure you that if I had, I would have billed my time, because lawyers are not in the business of giving away their time if they can help it. There are, as you know, incredible hourly billable -- hourly billable pressures on attorneys. And the affidavits from the firm now comport

with my recollection that I didn't work on any Monsanto cases.

We know, too, that from 1993 to 1995 I was not at Husch & Eppenberger. I was on the congressional staff of Congressman Gephardt. So for five years before I went on the bench, I didn't do any legal work for Monsanto. And I can tell you I know I didn't do any litigation involving seeds for Monsanto.

I don't know when seed litigation started. You all probably know better. I don't know when Bt – any of the biogenetically altered seeds for cotton or soybean or corn went on the market, but I suspect it was after 1993. Can anybody answer that question for me so the record is clear?

MR. ORLET: It is my understanding, Your Honor, that the genetically modified soybeans and cotton and corn were first available on a limited basis in 1995, and then commercial -- certain products were commercialized in 1996. And there was --so there would have been no litigation prior to that time.

THE COURT: And certainly we all know that these technology agreements have this venue provision in them so if those cases found their way to the Eastern District of Missouri, I'm sure Mr. Robertson, in his diligent search of the court's records, would have found my name on any of the seed cases that were here. But he didn't find any because there aren't any.

And, Mr. Robertson, you suggested this all came to you from a reporter from the New York Times. You won't be surprised to know that he tried to call me. His first question to me was: Why didn't you disclose your relationship with Husch & Eppenberger in the Blades case?

An interesting question, since Husch & Eppenberger wasn't in the Blades case. But that was what he wanted to

know. Because I had -- he apparently concluded I had disclosed it in the Kem Ralph case; why hadn't I disclosed it in another case where Husch & Eppenberger wasn't even attorneys of record for anybody?

So I'm not sure that the reporting by this business reporter in Chicago is very probative of any legal standards or any legal expertise, given the approach, at least as I understood it, as it was presented to me. Let's talk about how this case got here and then to me.

First and foremost, I was sworn in in January of 1998. This case was filed, not by much, but more than two years later in this jurisdiction, and I drew it. At that time, this case was filed by lawyers at the law firm known as Thompson Coburn. Having not done any work for Monsanto, not having certainly worked on anything like this, there was no moment to contemplate whether I should hear this case. When you look at the canons, 3.3-1 – I have to find the right cite.

The fact that a party to litigation is in other matters a client of the judge's former law firm does not necessitate recusal. The mere fact that Monsanto was in this court represented by Thompson Coburn, and the mere fact that Monsanto had been a client of my firm is not a basis for recusal. The canons are clear about that. And the litigation proceeded then for two years after that with Thompson Coburn representing Monsanto in this case.

Then in January of 2002, if I recall the time line correctly, these attorneys and others left the law firm of Thompson Coburn and joined my former law firm at Husch & Eppenberger. I'm now four years on the bench. I've never heard a single case with Husch & Eppenberger.

I consulted with members of the Code of Conduct Committee. I did not seek a formal opinion, but I did consult

with members of the Code of Conduct Committee, the Judicial Conference of the United States, and it was suggested to me clearly then that I had a duty to continue the case, because I have a duty to hear cases that are assigned to me, and that this was not a basis for my recusal that these lawyers had now joined my old firm.

I had never practiced law with them. I had never participated in any litigation with them. I hadn't done anything -- I didn't know these people.

So it became clear, based upon my reading of the canons and my conversations with members of the Code of Conduct Committee, that as what happens over time, as law firms change their character and their members, you now have to begin deciding which attorneys, not entire law firms, you should recuse from, because again, I'm putting an inappropriate and unnecessary burden on other attorneys if substantial numbers of attorneys in this case -- I don't know, how much was it, thirty?

MR. ORLET: About twenty-five.

THE COURT: Twenty-five lawyers moved from Thompson Coburn to my old firm. There was no reason to treat those twenty-five lawyers any different than any other lawyer in St. Louis. I had never practiced law with them. I had no prior relationship with them.

I would submit to you there are attorneys outside of Husch & Eppenberger with whom I have significant personal relationships I wouldn't hear cases with. So then I have to begin substituting that judgment then at Husch Eppenberger: Which of those attorneys fall in the category of people that I have significant relationships with that would raise the question of -- question my impartiality? So I took the case. I made sure that everyone knew that this change would --

what effect it had, but it didn't, of course, change my analysis that I should hear the case.

So let's go to the statute. That's where we start in every case. Isn't that what they teach you in law school? You have to always start with the law. We have to look at 28 U.S.C. 445.

What do we know? Strangely enough, the really absolute provision is not the first section. Section 455(b)(2), where the private practice he served as lawyer –okay. He shall disqualify himself in the following circumstances: (b) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer had been a material witness concerning it.

That's why it's so important to understand the answer to the question about whether the parties contend this is the same matter in controversy, because if it is, it doesn't matter if my name appeared on a document or didn't appear on a document or I knew about the case or not, because if it is the same matter in controversy as the Pioneer/Monsanto Bt corn license litigation, that's the end of the analysis. I should recuse myself, I guess leave it to somebody or myself to vacate the rulings and move on.

This case is about Mr. Kem Ralph who possessed some genetically modified seed, soybean and cotton specifically, that was patented by Monsanto. The gravamen of the claim is that despite his obligation to only plant it for one season, he saved it, delinted it, and planted it again. As we all know, Monsanto sued him, claiming to enforce a technology agreement and force their patent rights under the soybean and cotton.

If we look at the Little Rock decision that Judge Arnold wrote this week, he observes what causes us such trouble here in part. The term "matter in controversy" is not defined by the statute. He concludes that this deliberate choice by Congress demonstrates an intent that the words "matter in controversy" mean something other than what we commonly refer to as a case.

He cites the prior Little Rock decision. And again, we're talking about desegregations cases in Little Rock, Arkansas, and says in that case, earlier case in 1988 – tell you how long that litigation lasted – we discussed but did not decide whether a matter in controversy could extend beyond a single case.

They concluded --he concluded in that case that the judge in Arkansas, while he had been involved in mandamus proceedings involving that same case but in the course of representation had never addressed the merits of that case or expressed any opinion about them – there were four companion cases; one had been severed – the issues before the judge in the present matter were wholly unrelated to his prior representation.

I do not think – well, let me make another observation. The Pioneer/Monsanto case, which has been made reference here, was pending, I think, for two years while the Kem Ralph case was pending. In the same building. And I have no doubt, given the quality of lawyering that's gone on in this case, that if they were the same matter in controversy, one of two things would have happened: I would have had a request to transfer this case to Judge Webber, because out of judicial economy and interest to the parties they would be combined or at least combined for discovery because they would be so closely related to be the same matter in controversy; or I would have heard all about that Pioneer/Monsanto litigation and how it affected the Kem Ralph case.

Neither of those things are true. There was no effort to consolidate, join discovery, or engage in any discussion that these cases were the same matter in controversy.

I do not think any reasonable person, knowing the facts of the two pieces of litigation, would conclude that these are the same matters in controversy. And I don't think you need any discovery to figure that out. I think it's clear on the face. I don't think you need to look behind anything. I think it's obvious. And I think it's so obvious that no reasonable person, knowing the facts, would reach that conclusion.

Therefore, my recusal under 455(b)(2) is not required. Of course, you know that's just the beginning of the analysis, and I apologize for being so lengthy.

Then we have to look to 455(a). Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

And I understand in part the social traction that might arise from the plain language of that, but that's not the standard -- you have to look at how the case law has been interpreted to reach the conclusion as to what that is. Would the average person, knowing the facts, conclude that the judge's impartiality might reasonably be questioned?

Now, we know that on one overarching level -- and we know this, unless you're unwilling to take my word for it --that I don't have access to any information from Monsanto, never had anything to do with the Pioneer/Monsanto litigation. Knowing that fact, there is no reason to question my impartiality.

And second, we go to the -- we can go to the canons. If a former client of the judge is a party -- and notice, it's not former client of the firm. If a former client of the judge is a party, but the litigation is totally unrelated to the earlier

representation, whether recusal is required depends upon such factors as the length of time since the earlier representation ended, the nature, duration, and intensity of the earlier representation, the presence or absence of ongoing personal relationships, et cetera. Regardless of these factors, however, it is generally inadvisable for a judge to preside in a former client's case until at least two years after the earlier representation ended.

I don't believe Monsanto is a former client of mine. Mine. Notice it said "of the judge," not "of the law firm." Words have meaning. Even giving your argument that my withdrawing from this case that I never worked on made that a representation, I drew this case two years after I came on the bench. There could be no more minimal participation, no more minimal relationship than what you've described on the record here today.

No amount of discovery of Monsanto's relationship with Husch Eppenberger, whatever it is or isn't, doesn't change my relationship or clear lack thereof with Monsanto in determining whether I should recuse in this case.

These are not the same parties. They are not the same issues. We know it's not the same matter in controversy. It's not even the same seed. I will give you that seeds are involved, but that's not enough commonality to even start this conversation, much less rise to the level of recusal.

I do believe that the Tobacco Brazil case is much more analogous to the situation than the case where the judge sat in meetings and discussed about property that was needed to build a hospital and then ruled on the land at a later time. Even this is not the end of the analysis.

The last question is, do I have any personal knowledge of confidential information, facts that would cause

bias or impartiality, and I think that's clearly been established as no.

I'm deeply troubled by the planting throughout the defendant's brief of other cases that have been filed here that, again, are of no moment in this case. There is no standard that because I was a partner at Husch, and Husch had a client that was Monsanto, that I'm precluded from hearing Monsanto cases at a later time unless they were my client. So the suggestion that the mere fact that legal fees were paid by Monsanto to my former firm is not a reason to recuse.

If it were, there wouldn't be the specific admonition that I'm to hear cases with former clients if they're represented by other firms, even during the time period I'm not hearing cases with my former firm. That's not the test. There is no basis for that argument.

There is a suggestion that because – I enjoyed this. There's an anti-trust case I've never read called Monsanto against Spray-Rite Service Corporation, a Supreme Court case decided in 1984. I didn't pass the bar until 1982. I can assure you that whatever that case is, is of no moment to me. And I know that neither of those parties would let me argue that case in Supreme Court eighteen months after I got out of law school, or less. It was printed in '84. We know it was probably argued in late '83.

There is a cite to a miscellaneous case, Plant Genetics System, N.V. v. Ciba Seeds, a Mycogen Plant Science. That was a Charles Shaw case in 1997 where there was a motion to quash a subpoena. That has nothing to do with me, but yet it's used here to make some point that I don't understand.

There was a case in North Carolina where they fought about whether a subpoena should or shouldn't be enforced, and it was resolved without a ruling by the Court. But

apparently Husch & Eppenberger was local counsel for one of the parties, and it's cited in here.

And what's interesting, too, is this motion reads as if -- and suggests that I had a duty and an obligation to disclose to Mr. Ralph my relationship with Monsanto, whatever that is. Duty to disclose, while it seems to be the cornerstone of this argument, is a totally false issue, because if this was the same matter in controversy, no amount of disclosure will solve that.

Let me go to the statute again to make that point. There is a lot of suggestion in here that I had an obligation to disclose, and I don't believe that, like I said, any amount of disclosure would cure -- I know it wouldn't cure the matter in controversy issue.

Usually disclosure comes up if there is a personal relationship or a relative in the case and you disclose it, but in my conversations with members of the Code of Conduct Committee, what the scholarly writings they provide judges at judge school, is that except in these extraordinary circumstances where there might be a personal relationship, the judge is to make the determination about whether disclosure applies -- disqualification is appropriate or not. You are not to turn the conduct of your courtroom over to attorneys, and in fact, it puts the attorneys in a terrible position.

To disclose something that you can't waive, yet you have an obligation then to go tell your client, Oh, by the way, the judge told me this, this, and this, but he's going to stay on the case, you just don't concede the control of litigation in your courtroom.

So I think the total issue of disclosure here is, A, I don't think there was anything to disclose. Monsanto wasn't a client of mine. I understand that one withdrawal, but it had been more than two years, and I didn't consider them a client.

Either way you cut that, there's nothing to talk about in terms of disclosure.

There were also references to other cases I've handled since I came on the bench, including the Monsanto and Knackmus case which was filed in 1998, which I made no substantive rulings in. The case was settled approximately six months after it was filed. I don't know what probative value that has in this proceeding unless you're just trying to poison the well. It's just consistent with my view that Monsanto hadn't been a client and wasn't a client of mine, and I heard Monsanto cases and filed by other law firms other than Husch & Eppenberger after I came on the bench, consistent with the canons.

In fact, you've filed a number of docket sheets from those cases, I heard, which I don't think are in any way consistent with any rulings or determinations I made, but certainly don't prove or disprove anything about your motion to recuse here. If, in fact, you reach the argument that perhaps that withdrawal in that case – the only thing I did in that case – creates, makes Monsanto a client, whether I should or shouldn't have heard a case in 1998 or 1999 is of no moment about cases I heard in the year 2000.

I point to the fact that in the Blades transcript, which was attached to the motion and must have been read by counsel for Mr. Ralph, where I said, "But in this instance, I can tell you and assure you that as an attorney at Husch & Eppenberger, I never worked on any seed cases."

And in that case I also made it clear that I never participated in the Pioneer/Monsanto case. I never worked on that case. This is in quotes: "I never talked to Joe Conran about that case. I never talked to anyone at Monsanto about that case. I never read a document about that case. I never even read the complaint. That's why I was able to say it' s hard

to disclose a case you do not know about that you never did anything on."

I went on later, when I was discussing the analogy to the Tobacco Brazil case, referring to Mr. Conran, I said: "He put my name on it, but I never worked on it. I never prepared anything. I never talked to anybody. I didn't have any participation. And for those of you who are given as lawyers or want to be, and perhaps reporters" – I was talking to Mr. Shinkle from the Post Dispatch, I guess - "I don't know"– "and perhaps reporters, I don't know, do engage in mental gymnastics. What does the word 'participation' mean? What is he leaving out?" Lawyers are always going to ask that question.

"He used the word 'participation." What's the pregnant negative in that sentence? "Let me assure you" – this is a quote from then and just applicable now - "that the word 'participation' is as universally inclusive as I can humanly make it. I did not participate in the Pioneer against Monsanto case."

I went on to discuss the fact that I had not worked on Monsanto matters for at least two years before I came on the bench, which should not be taken as an inference that I must have done something earlier, because I said I never worked on any seed cases. So there can be no pregnant negative taken from that comment and taking it out of context and trying to make that sentence mean something that it is not intended to mean.

So any suggestion that I participated in any litigation involving seed companies or seed cases, and specifically saved seed cases as these have come to be known, which didn't even exist until 1995 or 1996, is without any basis in fact, because we know from the record, and from me telling you, that I did not do any work for Monsanto from 1993 until

I joined the bench, for more than five years before I joined the bench, and seven years before I drew this case.

And that doesn't mean that in 1992 I handled Monsanto cases. I'm just telling you that I know for certain for at least five years before I came on the bench I didn't handle any seed cases or any seed litigation or any saved seed litigation of any sort. To my knowledge, all the saved seed litigation was at Thompson Coburn, and that was something Husch & Eppenberger only did after the lawyers we previously discussed joined Husch & Eppenberger in the year 2002.

I almost hate to do this, but you know in the Blades case, Geoffrey Hazard, the professor at Penn, offered an opinion about whether I should recuse myself, and he concluded that the cases in Blades and the Pioneer/Monsanto case were not the same matter in controversy. I disagree with a lot of what else he says, but it's a fundamental basis.

The discussion here today was that somehow the cotton -- the corn licensing agreement might have some remote possible relation to an anti-trust discussion about soybean and corn, is too remote and too tenuous for me to consider, to be honest. But in a case of the Blades case, where there was anti-trust discussions -- that's what the whole case is about, a nationwide class-action case. The professor there couldn't find those cases to be the same matter in controversy. I think he's wrong for a lot of other reasons in his affidavit, and I don't think that it's up to professors to substitute their judgment for judges.

I think that's the best thing about today, where I started, is that we're going to get the benefit of a review from a circuit court. That's where the great thing is here, is that you will have the confidence in the outcome because you will get that independent review which is so vital to all of us.

Lastly, I have to say that as a matter of practicality, if there were other cases -- and, Mr. Robertson, you've alluded to the fact you litigate with Monsanto in more than just this case. I don't know how many cases you have against them for farmers who are involved in saved seed litigation, but it's more than one or two. In fact, it kept popping up during the course of this litigation where Mr. Orlet would try to get you not to talk about something in another case, and I'm sure you were doing the same thing to Mr. Orlet.

Let me submit to you that if there were cases out there that had an impact or effect on this case, you would know about it. Just like I concluded that since the Pioneer/Monsanto case existed in this building for two years while this case was going on, if there were other cases that had any impact on this case, I know you would know about them. You wouldn't wait four years to come in here and tell me about them. They would have an effect on the outcome of this case. There might be decisions in those cases that would be a benefit to you in this case. In fact, you would have a duty to tell me if there was a case out there on all fours that would affect a decision I had.

This isn't some mystery. These are public records. Public records. I told you personally I never entered an appearance. The only thing you've seen is that one Pioneer/Monsanto case. And I didn't enter my appearance. Joe Conran signed a document with my name on it. I did apparently sign a withdrawal. That's the only thing I did in that case.

But I know that if there were cases out there that were the same matter in controversy or affected the outcome of the Kem Ralph case, we would all know about them. They're public documents. They're not secrets.

The Pioneer/Monsanto case was in this building and in the file room. If it was so critical to this case, we would all

know about it. Much less the same matter in controversy if it affected it, we would know about it. So I find it disingenuous now, after four years of litigation, to hear that there may be cases out there that are related to this case or have an effect on this case.

And before I conclude, the canons are clear that, just like the statute, if this was related, in any way related, the two cases, the same case standard – and by "same case," I'm using Judge Arnold now. It's not necessarily has to be the identical case, but the same parties, the same issues – then I can never hear the case. That's the law of the land, and that's the canon. That's not this case. There's no basis – there is no good-faith basis to argue that I have knowledge about any matters, documents, people, meetings at Monsanto. There is just no way.

So to raise this now, at this hour, in this appeal, to suggest that there are things you don't know about, that if you were given time to conduct discovery you could figure it out, there's no basis for that argument here. There's no good-faith basis for that argument here.

Whatever Monsanto's relationship is with Husch & Eppenberger isn't the question. If you read the canons, it's about my relationship with Monsanto, what I might have known. And the fact that you're involved in all this other litigation with Monsanto and you're coming in here and suggesting that because my former law firm has a relationship with Monsanto you should be allowed to go through all of their bills and look at those, I submit, perhaps, it's more of a backdoor way in other litigation than what's going on in this case.

But there's no – you have not come forward and established any reasonable basis to conduct discovery. I haven't read a single case where Rule 60 even permitted discovery.

You had the burden of coming in here and proving bias by me, not to conduct discovery of an adversary law firm. And you haven't shown me anything. And even what little you've shown me, even if we give it its due for a moment, which I don't agree with, it doesn't establish recusal under the canons of the statute.

So we don't take that and then suddenly open the floodgates to see if maybe perhaps you can find something, because some reporter called me and said, "Why didn't you disclose your relationship with your former law firm?" when it wasn't even a participant in another case. That's not the basis to conduct discovery here, and, I submit, it's disingenuous.

There would be a substantial argument -- although I don't think it's necessary -- that if this case or these cases were so similar that I should have never heard it, that you had a duty to come in here immediately and tell me about it. You submit to me that you did, but I would submit if these cases were so similar, you would have known about them more than four years ago and not just two months ago.

That belies the argument all by itself. It falls of its own weight. If you did know about it and you waited until the outcome of this litigation, while the recusal is not waivable, you can forfeit it for failure to act on it in a timely basis, because all of us lose -- myself, you, Mr. Ralph, Monsanto -- if we lie in the weeds and wait until the litigation is done to see how it comes out before we raise the issue. You can't do that. That's not permissible. It's a unique result. While it's not waivable, it may be forfeited.

As a result, it's my conclusion to deny the request for discovery because there is no good-faith basis for it. And under 28 U.S.C. 445(b)(2), as well as Canon 3C(1)(b) of the Code of Conduct for United States Judges, a judge must

recuse in a case where the judge, quote, served as lawyer in the matter in controversy.

Similarly, the Judicial Conference on the Codes of Conduct have advised that when a judge's former client is a party to litigation and the former representation is in any way related to the current litigation, recusal is mandatory no matter how long ago the representation ended. Again, citing the Compendium of Selected Opinions, Section 3.6-5(a).

These authorities do not mandate my recusal here because any prior representation of Monsanto -- if, indeed, the listing of my name as counsel of record, even though I did no work, constituted representing Monsanto -- was not related to the litigation now pending before me. These are two entirely different cases. That is beyond dispute. And I do not believe any objective observer, knowing the facts, could reach a contrary conclusion. Therefore, in no way could these two unrelated cases be termed a single matter in controversy under the statute.

Given the lack of basis for recusal under Section 455(b), recusal under these circumstances is governed by the general appearance of partiality standard of Section 455(a), as well as Canon 3C(1) of the Code of Conduct for United States Judges, which mandates a judge's recusal, quote, in any proceeding in which his impartiality might reasonably be questioned, end quote.

The Committee on the Codes of Conduct has addressed the considerations that bear on a judge's recusal decision when a former client appears before the judge in a matter unrelated to any earlier representation.

In the opinion of the Committee, quote: If a former client of the judge -- of the judge, and I don't agree that they are. But if a former client of the judge is a party, but the litigation is totally unrelated to the earlier representation,

whether recusal is required depends upon such factors as the length of time since the earlier representation ended, the nature, duration, and intensity of the earlier representation, the presence or absence of ongoing personal relationships, et cetera. Regardless of these factors, however, it is generally inadvisable for a judge to preside in a former client's case until at least two years after the earlier representation ended. Compendium of Selected Opinions, Section 3.6-5(b).

Application of the factors spelled out by the Committee makes it clear that I should not recuse under these circumstances. In fact, it is well settled that I have a duty to hear cases unless recusal is required.

The Judicial Conference on the Codes of Conduct in its Published Advisory Opinion 52 provides: The Committee is of the view that unwarranted recusal might bring public disfavor to the bench and to the judge himself. Where the provisions of the canons point to recusal, the recusal must follow, but where the only factor presented – only factor present is supersensitivity on the part of the judge, or his distaste for the litigation, or his annoyance at a party's suggestion that he recuse himself, and nothing more, the dignity of the bench, the judge's respect for the fulfillment of his judicial duties, and a proper concern for his judicial colleagues all require the judge not recuse himself.

Which brings us to the cornerstone premise that – counter recusal, is that a judge has a duty to decide matters assigned unless disqualified. That is an equal consideration. Unless disqualified, I am required to hear the case.

Both the Congress and the Judicial Conference have provided formal mechanisms for determining whether a judge is disqualified. Quoting Judge Hansen in an Eighth Circuit case, Southwestern Bell v. FCC: Because the rules do not require my recusal, I am obliged to remain. Judges have an obligation to litigants and their colleagues not to remove

themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone and facilitate judge-shopping. There is as much an obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.

Application of all these factors spelled out by the Committee, spelled out by the Congress, spelled out by the case law, make it clear that I should not recuse. The duration and intensity of my earlier representation, if that's of Monsanto, if that's what you call it, is so minimal, because I did no actual work for Monsanto. My name was merely listed as counsel on certain documents filed in court by others. I have no ongoing personal relationships with people affiliated with Monsanto. It has been now over six years since any supposed representation of Monsanto ended. In sum, all of the factors identified by the Committee strongly counsel against recusal.

Therefore, the motion to conduct discovery is denied. The motion for me to recuse is denied. And I look forward to the input of the Eighth Circuit in the Blades case and the federal circuit in the Kem Ralph case. And thank you all very much for your arguments today.